

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JUAN MARTINEZ,

No. C 09-1349 MHP (pr)

Plaintiff,

**ORDER DENYING MOTION TO  
DISMISS**

v.

ERNESTINE ROBINSON; et al.,

Defendants.  
/**INTRODUCTION**

Juan Martinez, an inmate at the Correctional Training Facility in Soledad, California, filed a pro se civil rights action for damages under 42 U.S.C. section 1983 alleging that defendants violated his right to be free from retaliation. Defendants have moved to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure on the ground that plaintiff did not properly exhaust available administrative remedies under 42 U.S.C. section 1997e(a). Plaintiff has filed an opposition. For the reasons discussed below, the court will deny the motion.

**BACKGROUND****A. Scope of Complaint**

Martinez alleges the following in his complaint: In July 2007, he was a garment assembler for Prison Industries Authority at CTF-Soledad. On July 26, 2007, he complained to superintendent Ernestine Robinson that supervisor Stillerman was insulting Hispanic workers. She declined to do anything about the problem. As Martinez departed, he told her

1 an inmate appeal would be filed against them. Thereafter, Robinson contacted custody staff  
2 and asked the custody staff to remove Hispanic workers from the job site and send them back  
3 to their cells. Another inmate heard Robinson talking with Phil Earley about the matter;  
4 Robinson reportedly said that she didn't need another civil complaint in her file and Earley  
5 reportedly responded that they should say that Martinez and others were "instigating this."  
6 Complaint, p. 6. Martinez later received a CDC-115 accusing him of participating in a work  
7 stoppage on July 26. On July 30, 2007, Martinez was informed that he had been suspended  
8 from work. He complained. The associate warden gave him permission to return to work on  
9 August 1, but Robinson and Earley refused to let him return to work on August 2. After  
10 talking to the associate warden again, on August 6, he left a telephone message for Robinson  
11 telling her that the associate warden said he needed to go to work. On August 7, Martinez  
12 was transferred to ad-seg, and received a CDC-115 for making threats against Robinson. On  
13 August 30, he was released from ad-seg and transferred to another yard, on the  
14 recommendation of associate warden Ortiz. On September 11, 2007, Martinez was found not  
15 guilty of the CDC-115 that accused him of threatening staff. He alleges that defendants  
16 Robinson and Earley retaliated against him for exercising his First Amendment rights.

17 The court conducted an initial review under 28 U.S.C. section 1915A. The court  
18 liberally construed the complaint, and determined that it alleged a cognizable claim against  
19 the defendants, who allegedly retaliated against Martinez after he complained of verbal  
20 harassment and stated he would be filing an inmate grievance.

21 B. Administrative Exhaustion Efforts

22 Martinez filed two separate appeals relevant to this case, Appeal Log # 07-03358 and  
23 # 07-03748. Martinez also tried three times to submit another appeal, but all were rejected for  
24 supposedly duplicating Appeal Log # 07-03358.

25 In Appeal Log # 07-03358, Martinez complained of racial discrimination on the part  
26 of Stillerman and failure to reprimand staff on the part of Robinson. At the second level, the  
27 reviewer partially granted the appeal, noting that appropriate supervisory staff conducted an  
28 inquiry into the matter. Id. The second level decision noted that the retaliation claim that

1 arose from this appeal's underlying incident was a separate matter covered exclusively by  
2 Appeal Log # 07-03748. Id. Martinez pursued the matter, and his appeal was denied at the  
3 director's level. Id.

4 In Appeal Log # 07-03748, Martinez alleged that Earley had retaliated against him  
5 for filing an appeal concerning racial discrimination. At the second level, the reviewer found  
6 that appropriate supervisory staff conducted an inquiry into the matter and that the  
7 information obtained was confidential and not subject to disclosure. Martinez appealed the  
8 decision to the director's level, and it was denied at the director's level. Id.

9 In addition to the two inmate appeals that received appeal log numbers, Martinez tried  
10 three more times to file an appeal that included a claim that Robinson had retaliated against  
11 him. His inmate appeal dated October 9, 2007 complained that Robinson had retaliated.  
12 Opposition, Exh. B. That appeal was screened out as duplicative of Appeal Log # 07-3358.  
13 Opposition, Exh. C. Martinez responded with a letter to the appeals coordinator asking that  
14 the screen-out decision be reconsidered because the appeal was not duplicative. Opposition,  
15 Exh. D. The appeal coordinator sent back the materials and explained again that they were  
16 duplicative of Appeal Log # 07-3358. Opposition, Exh. E. Martinez tried yet again to have  
17 his appeal considered, and sent a letter to the warden explaining that his new appeal was not  
18 duplicative. Opposition, Exh. F. The appeal coordinator sent back the materials and  
19 explained yet again that the new appeal duplicated Appeal Log # 07-3358. Opposition, Exh.  
20 G.

## 21 DISCUSSION

22 "No action shall be brought with respect to prison conditions under [42 U.S.C. section  
23 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other  
24 correctional facility until such administrative remedies as are available are exhausted." 42  
25 U.S.C. § 1997e(a). The State of California provides its inmates and parolees the right to  
26 appeal administratively "any departmental decision, action, condition or policy perceived by  
27 those individuals as adversely affecting their welfare." See Cal. Code Regs. tit. 15, §  
28 3084.1(a). In order to exhaust available administrative remedies within this system, a

1 prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal  
2 written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution  
3 head or designee, and (4) third level appeal to the Director of the California Department of  
4 Corrections and Rehabilitation. See id. § 3084.5; Woodford v. Ngo, 548 U.S. 81, 85-86  
5 (2006).

6 Exhaustion in prisoner cases covered by section 1997e(a) is mandatory. Porter v.  
7 Nussle, 534 U.S. 516, 524 (2002). All available remedies must be exhausted; those remedies  
8 "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" Id.  
9 (citation omitted). Even when the prisoner seeks relief not available in grievance  
10 proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.; Booth v.  
11 Churner, 532 U.S. 731, 741 (2001). The statute requires "proper exhaustion" of available  
12 administrative remedies. See Woodford v. Ngo, 548 U.S. at 93.

13 A prisoner's failure to exhaust administrative remedies is a matter in abatement.  
14 Defendants have the burden of raising and proving the absence of exhaustion, and may do so  
15 by way of a motion pursuant to Rule 12(b). Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.  
16 2003). "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the  
17 court may look beyond the pleadings and decide disputed issues of fact." Id. at 1119-20  
18 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir.  
19 1988))

20 Martinez exhausted the administrative remedies available to him. As to his retaliation  
21 claim against defendant Earley, he filed an inmate appeal (i.e., Appeal Log # 07-3748) that  
22 (a) concerned the claim asserted in his complaint and (b) received a decision at the director's  
23 level before he filed this action.

24 As to his retaliation claim against defendant Robinson, Martinez did all that he could  
25 to exhaust his claim against her. He tried three times to file an appeal that concerned the  
26 claim asserted in his complaint, but he was rejected each time because the new appeal  
27 supposedly duplicated an earlier appeal. The prison staff's rejection of his attempts to pursue  
28 the retaliation appeal against Robinson excused him from further exhaustion efforts.

Defendants contend that Martinez did not properly exhaust his retaliation claim in Appeal Log # 07-3358 because the appeal did not allude to retaliation. That Martinez did not allude to retaliation in the appeal is not dispositive because, when he attempted to submit an inmate appeal that did mention Robinson's alleged retaliation, the appeals coordinator screened it out as duplicating Appeal Log # 07-3358. Martinez was told his new retaliation appeal was duplicative of the earlier appeal not just once, but three times. The prisoner need not exhaust further levels of review once he was reliably informed by an administrator that no more remedies were available. Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005). Denying Martinez the ability to appeal Robinson's retaliation because Appeal Log # 07-03358 supposedly covered it, while maintaining in that same appeal that the retaliation claim was a separate matter, afforded the plaintiff no available remedy. The court finds that the improper rejection of Martinez's attempts to pursue the retaliation appeal against Robinson excused him from further exhaustion efforts. Cf. Marella v. Terhune, 568 F.3d 1024, 1027-28 (9th Cir. 2009) (implying that case should not be dismissed for non-exhaustion if the inmate appeal was screened out improperly).

Defendants also argue that Martinez did not abide by applicable procedures and did not file timely appeals. This appears to be a post-hoc rationale since the reason given at the time of the denial related to the duplicativeness of the appeals.

### CONCLUSION

Defendants' motion to dismiss is DENIED. (Docket # 9.)

The court has a Pro Se Prisoner Mediation Program in which selected prisoner cases with unrepresented plaintiffs are referred to a neutral magistrate judge for mediation proceedings consisting of one or more conferences as determined by the mediator. Good cause appearing therefor, this case is now referred to Magistrate Judge Vadas for mediation proceedings pursuant to the Pro Se Prisoner Mediation Program. The proceeding will take place within ninety days of the date this order is filed. Magistrate Judge Vadas will coordinate a time and date for a mediation proceeding with all interested parties and/or their representatives and, within five days after the conclusion of the mediation proceedings, file

1 with the court a report for the prisoner mediation proceedings. The clerk will send to  
2 Magistrate Judge Vadas a copy of the case file for this action.

3  
4 IT IS SO ORDERED.

5 Dated: July 28, 2010

  
Marilyn Hall Patel  
United States District Judge